Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

TRIDENT ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SHELDON S. TOLL
(Counsel of Record for Petitioner
Trident Associates Limited Partnership)
HONIGMAN MILLER SCHWARTZ AND COHN
2290 First National Building
Detroit, Michigan 48226
(313) 256-7800

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QUESTION PRESENTED

Did the Court of Appeals err in affirming the District Court's affirmance of the Bankruptcy Court's interpretation of section 109 of the Bankruptcy Code, 11 U.S.C. § 109, entitled "Who may be a debtor," that disregarded the express wording of § 109 and implied a so-called "good faith" filing requirement in § 109 for Chapter 11 cases?

PARTIES TO THE PROCEEDING

There are no other parties to this proceeding besides those listed in the caption. Pursuant to Rule 29.1 of this Court, petitioner states that it is not a corporation, and that it has neither a parent nor a subsidiary.

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No. 95-___

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TRIDENT ASSOCIATES LIMITED PARTNERSHIP,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Trident Associates Limited Partnership ("Petitioner"), respectfully prays that a Writ of Certiorari issue to review the opinion and Judgment of the United States Court of Appeals for the Sixth Circuit which was entered in this matter on May 1, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (1a) affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 52 F.3d 127 (6th Cir. 1995). The order of the

United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* (15a) is not reported. The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Motion for Stay of Mandate (31a) is not reported. The opinion and order of the United States District Court for the Eastern District of Michigan affirming decision of the Bankruptcy Court (17a) is not reported. The opinion of the United States Bankruptcy Court for the Eastern District of Michigan granting motion filed by Metropolitan Life Insurance Company ("MetLife") to lift stay (24a) is reported at 176 B.R. 16 (Bankr. E.D. Mich. 1993).

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on May 1, 1995; the order of the Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* was entered on May 25, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Respondent, Metropolitan Life Insurance Company ("MetLife") may argue that certiorari should not be granted on the grounds that this appeal is moot, because (i) the Sixth Circuit denied Petitioner's motion for stay of mandate pending filing a petition for writ of certiorari (31a), and (ii) subsequent thereto, MetLife recorded a deed conveying the real estate in question to itself. MetLife is not a bona fide purchaser. At the time of recording of the deed conveying title to MetLife,

MetLife knew Petitioner was preparing a petition for writ of certiorari. Central to a finding of mootness is a determination that a court could not grant effective judicial relief. *In re Seidler,* 44 F.3d 945 (11th Cir. 1995); *In re Spirtos,* 992 F.2d 1004 (9th Cir. 1993); *In re Andreuccetti,* 973 F.2d 413 (7th Cir. 1992). This appeal would be moot only if the transaction whereby MetLife acquired title to the real estate could not be unraveled. However, this transaction could be unraveled by ordering MetLife to return the property to the bankruptcy estate, see e.g. *In re United Merchants and Mfrs., Inc.,* 138 B.R. 426 (D. Del. 1992). Unraveling this transaction would not prejudice parties not before the court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

11 U.S.C. § 109 provides in pertinent part as follows:

> (a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.
>
> (b) A person may be a debtor under chapter 7 of this title only if such person is not –
>
> (1) a railroad;
>
> (2) a domestic insurance company, bank, savings bank. . . . ; or
>
> (3) a foreign insurance company, bank, savings bank. . . .

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity –

(1) is a municipality;

(2) is generally authorized to be a debtor under such chapter by State law. . . . ;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5) (A) has obtained the agreement of creditors holding at least a majority in amount. . . . ;

(B) has negotiated in **good faith** with creditors. . . . ;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

* * *

[emphasis added]

11 U.S.C. § 362 provides in pertinent part as follows:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of

this section, such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including lack of adequate protection of an interest in property of such party in interest;

* * *

11 U.S.C. § 1112 provides in pertinent part as follows:

(c) . . . . the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including –

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan;

(3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 of this title within any time fixed by the court;

(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;

(7) inability to effectuate substantial consummation of a confirmed plan;

(8) material default by the debtor with respect to a confirmed plan;

(9) termination of a plan by reason of the occurrence of a condition specified in the plan; or

(10) nonpayment of any fees or charges required under chapter 123 of title 28.

* * *

STATEMENT OF THE CASE

This is an appeal of a Bankruptcy Court order granting the motions of a real estate mortgage lender, Metropolitan Life Insurance Company ("MetLife"), (i) for relief from the automatic stay under 11 U.S.C. § 362 to permit it to foreclose its mortgage, and (ii) to dismiss the bankruptcy petition (the "Motions"). Both Motions were based upon the claim that the bankruptcy petition was filed in violation of a so-called "good faith" filing requirement. Petitioner, the owner of a 275,000 square foot office building in Farmington Hills, Michigan, constructed at a cost exceeding $25,000,000, filed for bankruptcy reorganization under Chapter 11, Title 11, United States Code, on June 22, 1993.

Petitioner proceeded to expeditiously file its plan of reorganization and disclosure statement on July 2, 1993. Before the Bankruptcy Court could consider Petitioner's plan and disclosure statement, MetLife brought its Motions, which had been filed on June 28, 1993, on for hearing, arguing that Petitioner had not satisfied an alleged "good faith" filing requirement for Chapter 11 petitions and, thus, the automatic stay should be set aside

to permit it to foreclose its mortgage and the bankruptcy petition should be dismissed.

On September 30, 1993, the Bankruptcy Court filed its opinion holding that (i) there is an implied "good faith" filing requirement for Chapter 11 petitions, (ii) Petitioner did not file its petition in "good faith," and, therefore, (iii) there was "cause" to set aside the automatic stay to permit MetLife to foreclose its mortgage and to dismiss the bankruptcy petition. Subsequently, the Bankruptcy Court granted Petitioner a stay pending appeal.

On November 19, 1993, the United States District Court for the Eastern District of Michigan denied Petitioner's appeal from the Bankruptcy Court and affirmed the decision of the Bankruptcy Court. On May 1, 1995, the Court of Appeals for the Sixth Circuit affirmed, holding that "a Chapter 11 bankruptcy petition may be dismissed if it is filed in bad faith," 52 F.3d at 130.

Subsequently, Petitioner timely filed a petition for rehearing and a suggestion for rehearing *en banc*. On May 25, 1995, the Court of Appeals for the Sixth Circuit denied the petition for rehearing and suggestion for rehearing *en banc*. On June 2, 1995, the Court of Appeals for the Sixth Circuit denied the motion to stay the mandate.

REASONS FOR GRANTING THE WRIT

I. The Opinion Below Conflicts With Decisions of This Court and Raises Important Questions Concerning the Eligibility To File a Petition Under the Bankruptcy Code

The opinion below, implying a so-called "good faith" filing requirement in 11 U.S.C. § 109 for the filing of Chapter 11 petitions, conflicts with the following decisions of this Court:

> *Toibb v. Radloff*, 501 U.S. 157 (1991) (reversing the 8th Cir.'s decision that an ongoing business requirement for Chapter 11 debtors should be implied in § 109); and
>
> *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (there is no implied good faith requirement for claiming exemptions under § 522 of the Bankruptcy Code).

Section 109 of the Bankruptcy Code, 11 U.S.C. § 109, entitled "Who may be a debtor," sets forth the eligibility requirements for filing a petition for relief under the various chapters of the Bankruptcy Code. In *Toibb, supra*, this Court held that "the language of § 109 is not unclear." 501 U.S. at 162. The question, in *Toibb*, was whether there was an ongoing business requirement to be implied in § 109. This Court answered that question in the negative, stating that "the plain language of the Bankruptcy Code disposes of the question before us." 501 U.S. at 160.

This Court reasoned that "Congress took care in § 109 to specify who qualifies – and who does not qualify – as a debtor under various chapters of the Code." 501 U.S. at

161. Since Congress did not insert an express ongoing business requirement into § 109, it was wrong of the courts to do so. As this Court, observed, "Congress knew how to restrict recourse to the avenues of bankruptcy relief. . . . " 501 U.S. at 161.

Although the *Toibb* decision did not deal with an implied "good faith" requirement in § 109, in the next term of this Court, a decision was handed down in *Taylor, supra*, holding that courts could not imply a "good faith" requirement into the exemption provision of the Bankruptcy Code, 11 U.S.C. § 522. Only Congress, reasoned this Court, could adopt a good faith requirement for claiming exemptions. As this Court reasoned:

> Congress may enact comparable provisions to address the difficulties that Taylor predicts will follow our decision. We have no authority to limit the application of § 522(1) to exemptions claimed in good faith. [112 S. Ct. at 1648-49]

Since courts cannot imply a "good faith" requirement in § 522 of the Bankruptcy Code, it is reasonable to infer that they cannot imply a "good faith" requirement in § 109 of the Bankruptcy Code, either. As this Court so clearly held in *Toibb*, there are no additional prerequisites for filing a Chapter 11 petition other than those set forth in § 109(d); courts cannot set up "an additional prerequisite for Chapter 11 eligibility beyond those established in § 109(d)." 501 U.S. at 163. Section 109(d) sets forth no express "good faith" filing requirement for Chapter 11 petitions.

To make the foregoing analysis even clearer, Congress did expressly provide in § 109 a "good faith" filing requirement for Chapter 9 petitions (see 11 U.S.C.

§ 109(c)(5)(B)). Therefore, the omission to state an express good faith requirement for Chapter 11 petitions cannot be argued to be accidental.

The ideas expressed in this Petition are not original to this author. They have been derived with grateful thanks from a beautifully written article by Prof. J. Flaccus, "Have Eight Circuits Shorted? Good Faith and Chapter 11 Bankruptcy Petitions," 67 *American Bankruptcy Law Journal*, pp. 401-455 (1993). As Professor Flaccus so cogently demonstrates, Congress believed that the early stages of a bankruptcy case were inappropriate to determine whether the case was proceeding in good faith or bad faith. Instead, Congress chose to insert a good faith requirement in the sections of the Bankruptcy Code dealing with confirmation of a plan of reorganization, see 11 U.S.C. § 1129(a)(3), indicating that at the time of confirmation of the plan, the bankruptcy court must determine whether "the *plan* has been proposed in good faith. . . ." [emphasis added]. See Flaccus, *ibid.*, pp. 413-414, and legislative history cited therein.

The opinion below acknowledged that 11 U.S.C. § 109 contains no express good faith filing requirement, but felt that fact did not prevent courts from implying a good faith filing requirement in 11 U.S.C. §§ 362(d) and 1112(b)(9a). However, if this Court were to accept the reasoning of the opinion below, it would mean that courts can put back into sections 362 and 1112 of the Bankruptcy Code what the legislative process explicitly took out of section 109 of the Bankruptcy Code, i.e. the good faith filing requirement.

Finally, the opinion below (11a) adopts eight factors (which are similar to the list of factors used by most of the other circuit courts of appeal) that determine whether a debtor lacks good faith:

(1) the debtor has one asset;

(2) the pre-petition conduct of debtor has been improper;

(3) there are only a few unsecured creditors;

(4) the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court;

(5) the debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford;

(6) the filing of the petition effectively allows the debtor to evade court orders;

(7) the debtor has no ongoing business or employees; and

(8) the lack of possibility of reorganization.

We submit that these factors apply to most, if not all, real estate debtors who seek to file Chapter 11 proceedings. The circuit courts have established a so-called "good faith" litmus test, not found in the text of the statute, to deny real estate cases eligibility for the bankruptcy process. In effect, the circuit courts have made the legislative determination that real estate debtors should not be allowed to file bankruptcy. However, such a determination is not for the courts to make. Rather, it is for the legislature to determine whether or not real estate

debtors should be allowed to file bankruptcy. Indeed, Congress has recently re-affirmed the public policy of allowing real estate debtors to file bankruptcy, *see* Bankruptcy Reform Act of 1994, Public Law 103-394, section 218 (Single asset real estate). Therefore, this Court should review the anti-real-estate debtor "good faith" filing test adopted by the circuit courts.

CONCLUSION

Because the court below misconstrued the law – i.e., the lack of power in the courts to imply a "good faith" filing requirement in 11 U.S.C. § 109 [or by inference in §§ 362(d) and 1112(b)] for the filing of Chapter 11 petitions – a writ of certiorari should issue to review the decision below.

Respectfully submitted,

SHELDON S. TOLL
(*Counsel of Record for Petitioner Trident Associates Limited Partnership*)
HONIGMAN MILLER SCHWARTZ AND COHN
2290 First National Building
Detroit, Michigan 48226
(313) 256-7800

July 28, 1995

In re TRIDENT ASSOCIATES LIMITED PARTNERSHIP, Debtor.

TRIDENT ASSOCIATES LIMITED PARTNERSHIP, a Michigan Limited Partnership, d/b/a Beztak of Tri Atria Limited Partnership, Plaintiff-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY, Defendant-Appellee.
No. 93-2469.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 26, 1995.

Decided May 1, 1995.

Mortgagee moved to lift automatic stay to foreclose on Chapter 11 debtor's sole asset based on debtor's alleged lack of good faith. The United States Bankruptcy Court for the Eastern District of Michigan, Ray Reynolds Graves, Chief Judge, 176 B.R. 16, entered order granting mortgagee's motion and dismissed Chapter 11 petition as "bad faith" filing. Debtor appealed. The District Court, Barbara K. Hackett, J., affirmed. On further appeal, the Court of Appeals, Ryan, Circuit Judge, held that Chapter 11 petition filed by newly created debtor with only a single asset and no ongoing business or employees was filed in "bad faith" and had to be dismissed.

Affirmed.

Sheldon S. Toll (argued and briefed) and Seth D. Gould, Honigman, Miller, Schwartz & Cohn, Detroit, MI, for plaintiff-appellant.

Judith G. Miller (argued and briefed) and Michael S. Khoury, Clark, Klein & Beaumont, Detroit, MI, for defendant-appellee.

Before: CONTIE, RYAN, and SILER, Circuit Judges.

RYAN, Circuit Judge.

Trident Associates Limited Partnership, a Michigan limited partnership, appeals from the district court's judgment affirming the bankruptcy court's dismissal of Trident Associates' petition under Chapter 11. Trident Associates assigns one error: The bankruptcy court abused its discretion when it lifted the automatic stay and dismissed Trident Associates' petition on the ground that it filed its petition in bad faith.

Trident Associates makes two arguments, one legal and the other factual: 1) the Supreme Court has *sub silentio* overruled this court's precedent establishing that a Chapter 11 filing may be dismissed for bad faith; and 2) the bankruptcy court clearly erred when it found that Trident Associates filed its petition in bad faith. Because we reject both of these arguments, we conclude that Trident Associates' assignment of error is without merit and we therefore affirm the decision of the bankruptcy court.

I.

This case involves Metropolitan Life Insurance Company's attempts to foreclose its mortgage in the Tri Atria

Office Center building and the 13 acres on which it sits in Farmington Hills, Michigan. On October 13, 1987, MetLife loaned $23 million to Tri Atria Company, a Michigan co-partnership. Tri Atria Company was the first identity that this debtor had. The debtor has had several identities all the while representing the interests of the Beznos and the Luptak families.

On December 27, 1990, the principals of Tri Atria Company co-partnership formed a new entity, Beztak of Tri Atria Limited Partnership. On the same day, Beztak of Tri Atria was reorganized. The next day, all assets from Tri Atria Company were transferred by quit claim deed to Beztak of Tri Atria Limited Partnership. The mortgage Tri Atria had given to MetLife required that such transactions be approved by MetLife, and MetLife gave its approval through its agent's signature on a letter agreement the agent signed on July 31, 1991. The letter agreement contained numerous requirements, including that the general partners of Beztak of Tri Atria always maintain at least a 28.43% interest in the partnership.

Beztak of Tri Atria failed to make two tax payments on the property, the winter 1990 and the 1992 property taxes. The outstanding taxes totaled $972,693.11. This failure constituted a default under the mortgage. Based on this default and consistent with the terms of the mortgage, MetLife accelerated the debt and provided the appropriate notice and recording. This acceleration was effective May 1, 1993. On May 10, 1993, the Oakland County Treasurer conducted a forced sale of its tax lien interest for the 1990 winter taxes. MetLife purchased this lien for $314,066.

On May 14, 1993, MetLife advertised notice of its proposed foreclosure sale of the property. The foreclosure sale was scheduled for June 15, 1993. On May 21, 1993, MetLife filed suit against Beztak of Tri Atria in the United States District Court for the Eastern District of Michigan seeking the appointment of a receiver, declaratory and injunctive relief, and recovery of converted funds, amongst other relief. The foreclosure sale was then postponed from June 15th to the 22nd so that a hearing could be held in the district court. In this proceeding, Beztak of Tri Atria was represented by the law firm of Evans & Luptak of which Mr. Luptak and Mr. Beznos, who were general partners of Beztak of Tri Atria, were principals.

On or before June 14, 1993, one day before the scheduled hearing in the district court, Mr. Toll, an attorney from a firm other than Evans & Luptak, prepared a Chapter 11 petition for a debtor called Trident Associates Limited Partnership. This petition was signed on June 14th by a person who represented himself to be the vice-president of Trident General Inc., Trident Associates' general partner. However, at the time this petition was signed, neither Trident Associates nor Trident General existed.

On June 15, 1993, four significant events took place. First, MetLife heard a rumor that Beztak of Tri Atria was preparing to file a Chapter 11 petition. MetLife took advantage of the prior assignment from Beztak of Tri Atria and notified all of the tenants of the Tri Atria Office Center to pay their rent to MetLife rather than Beztak.

The second event of the day was that the district court conducted a hearing on MetLife's request for the

appointment of a receiver and for injunctive relief. At this hearing, Beztak of Tri Atria was represented by attorneys from Evans and Luptak, including Kenneth Clarkston, whose presence is important because of what followed. At this hearing, the district court denied MetLife's requests and instructed the parties to continue their negotiations. MetLife advised the court of the rumors it had heard concerning Beztak of Tri Atria filing a bankruptcy petition. The court was critical of any attempt to delay or seek a different forum. Mr. Moran of the Evans and Luptak firm assured the court that he was unaware of any intention to file a bankruptcy petition, but told the court that he would have to confirm that with the client.

The third event of June 15th was the incorporation of Trident General, the entity listed on the bankruptcy petition that was later filed as general partner of the debtor, Trident Associates. The incorporator of Trident General was Kenneth Clarkston, the lawyer of the Evans and Luptak firm who was present at the hearing when Mr. Moran stated that he was unaware of any possible bankruptcy filing.

The last event of the day was perhaps the most significant: the total restructuring of Beztak of Tri Atria. Through a Certificate of Amendment of Limited Partnership, Beztak of Tri Atria changed its name to Trident Associates Limited Partnership. In addition, the structure was changed so that Trident General became the only general partner of the partnership and held only a 1% interest in the partnership. All the other general partners became limited partners. These transactions violated the letter agreement, and so constituted default under the mortgage, in two ways: first, the agreement requested

that the general partners of Beztak of Tri Atria m[illegible]intain at least 28.43% interest in the partnership, and [illegible]cond, any restructuring of this nature required the co[illegible]sent of MetLife.

On June 21, 1993, one day before the foreclos[illegible]re sale, Mr. Moran of Evans and Luptak filed a suit in th[illegible]e Circuit Court for the County of Oakland, Michigan. This [illegible]suit was filed in the name of Beztak of Tri Atria Limited [illegible] Partnership against MetLife. Beztak of Tri Atria h[illegible]ad been renamed and restructured six days earlier, so [illegible]hen this suit was filed, Beztak of Tri Atria was no long[illegible]er a legal entity. This suit asked for a temporary restrain[illegible]ing order to enjoin the foreclosure sale. In support of th[illegible]is motion was an affidavit from attorney Jerry Luptak d[illegible]ated June 21, 1993. In that affidavit, Luptak asserted tha[illegible]t he was a principal of "Beztak of Tri Atria Limited Pa[illegible]rtnership," which he claimed was the owner of the prope[illegible]rty subject to foreclosure. This sworn statement was fa[illegible]se in that Beztak of Tri Atria was then Trident Associat[illegible]es Limited Partnership and Luptak was no longer a pri[illegible]ncipal, but only a limited partner. The request for the TRO was denied.

The next day, June 22, 1993, was the day [illegible]scheduled for the foreclosure sale. It was to take place a[illegible] 10:00 a.m. Prior to 10:00 a.m., a lawyer from Mr. Toll's [illegible]firm called the persons conducting the foreclosure sale an[illegible] told them that a bankruptcy petition had been filed and [illegible]so the sale should not be conducted. The foreclosure sale [illegible]took place nevertheless, and MetLife was the high bid[illegible]er, buying the property for $19.5 million. At 10:09 a.m., [illegible]he Chapter 11 bankruptcy petition in the name of Triden[illegible] Associates Limited Partnership was filed with the bankr[illegible]uptcy court

clerk. There is a factual dispute concerning the exact time that the foreclosure sale took place, whether it was at 10:00 a.m. or 11:00 a.m. Because the bankruptcy court lifted the automatic stay and dismissed the petition for bad faith, this disputed fact has become moot.

On July 2, 1993, Trident Associates filed a plan for reorganization. MetLife filed a motion to lift or annul the automatic stay so that it could proceed with its foreclosure of the Tri Atria Office Center in the state court. On July 15, 1993, the bankruptcy court held a hearing on the issue of lifting the automatic stay. At that time, counsel stipulated to the admissibility and authenticity of the documents that make up the record and counsel offered arguments for and against the motion. The bankruptcy court found that Trident Associates had filed its bankruptcy petition in bad faith and so granted MetLife's motion to lift the automatic stay. The court also dismissed Trident Associates' Chapter 11 petition. Trident Associates appealed to the district court, which affirmed. This appeal followed.

II.

This court has recently identified the standards that are applied when it reviews decisions of the bankruptcy court. First, this court directly reviews the bankruptcy decision, not the district court's review of the bankruptcy court's decision. A bankruptcy court's decision to lift the automatic stay is reviewed for an abuse of discretion and the bankruptcy court's findings of fact will be reversed only if they are clearly erroneous. Lastly, we review *de novo* the bankruptcy court's conclusions of law. *In re*

Laguna Associates Ltd. Partnership (Laguna Associates Ltd. Partnership v. Aetna Casualty & Sur. Co.), 30 F.3d 734 (6th Cir.1994).

A.

Trident Associates argues that recent Supreme Court decisions have *sub silentio* overruled the eight circuits, including this one, that have held that a Chapter 11 bankruptcy petition may be dismissed if it is filed in bad faith. We conclude that this argument is wholly unpersuasive.

The bankruptcy court may dismiss a Chapter 11 petition "for cause." 11 U.S.C. § 1112(b). We have consistently held that a debtor's Chapter 11 petition may be dismissed if it was filed in bad faith. *See, e.g., In re Laguna Associates*, 30 F.3d 734; *In re Charfoos*, 979 F.2d 390 (6th Cir.1992); *In re Caldwell (Hardin v. Caldwell)*, 851 F.2d 852 (6th Cir.1988).

Recent Supreme Court decisions have overturned circuit court decisions that had read into the bankruptcy code requirements that were not specified in the text. In *Toibb v. Radloff*, 501 U.S. 157, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991), the Court overturned the "ongoing business requirement" that most circuits, including this one, had applied to petitions filed under Chapter 11. *Id.* at 166, 111 S.Ct. at 2202. The Court held that the plain language of 11 U.S.C. § 109 allowed *individuals* relief under Chapter 11. In *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992), the Court held that courts may not impose a good faith requirement on debtors who list property in the bankruptcy schedule as exempt pursuant to 11 U.S.C. § 522(*l*). *Id.* at 641-44, 112 S.Ct. at 1647-48.

In both *Taylor* and *Toibb*, the Court was dealing with very specific statutory language. In both cases, the Court rejected arguments that an extra requirement could be "engrafted" onto language that plainly did not create the requirement. Trident Associates characterizes the cases from this and other circuits as "reading a good faith requirement into § 109," which is the section that describes who may file a petition. It is true that § 109 has no good faith requirement, but that argument misses the point that 11 U.S.C. § 362(d)(1)[1] allows the automatic stay to be lifted "for cause," and 11 U.S.C. § 1112(b)[2] allows a petition to be dismissed "for cause." Neither section

---

[1] § 362(d) provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under [§ 362(a)], such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under [§ 362(a)], if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

[2] § 1112(b) provides in pertinent part:

Except [in a situation not applicable here], on request of a party in interest . . . and after notice and a hearing, the court may . . . dismiss a case under this chapter . . . for cause, including –

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan;

. . . .

defines "cause," but this court and others have concluded that debtor bad faith can constitute cause under both provisions. It is a very different argument to say that "bad faith" cannot, as a matter of law, constitute "cause" than to say that § 109 does not require good faith. Neither the holding of *Taylor* nor *Toibb* is broad enough to achieve the result for which Trident Associates argues.

B.

Trident Associates makes several attacks on the bankruptcy court's finding of bad faith. Essentially, it attacks the bankruptcy court's factual conclusions and its discretionary decisions to lift the automatic stay and dismiss the petition. Trident Associates bears a heavy burden because, as stated above, while we review the bankruptcy court's legal conclusions *de novo*, we examine its factual determinations only for clear error.

The bankruptcy court may lift the automatic stay "for cause." § 362(d)(1). Under § 1112(b), a court may dismiss a Chapter 11 petition "for cause." Neither § 362(d) nor § 1112(b) define "cause," so "courts must determine whether discretionary relief is appropriate on a case-by-case basis." *In re Laguna Associates*, 30 F.3d at 737. Under both of these sections, bad faith can constitute cause. *Id.* at 737-38. Because the "totality of the circumstances" must be considered, no single test for good faith can be recited, but this court has laid out some guidelines:

[G]ood faith is an amorphous notion, largely defined by factual inquiry. While no single fact is dispositive, courts have found the following factors meaningful in evaluating an organizational debtor's good faith:

(1) the debtor has one asset;

(2) the pre-petition conduct of the debtor has been improper;

(3) there are only a few unsecured creditors;

(4) the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court;

(5) the debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford;

(6) the filing of the petition effectively allows the debtor to evade court orders;

(7) the debtor has no ongoing business or employees; and

(8) the lack of possibility of reorganization.

Id. at 738 (citations and internal quotations omitted). Also, the court acknowledged what the Fifth Circuit called the "new debtor syndrome," in which "a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors." *Id.*

The factual similarity between *In re Laguna Associates,* in which this court affirmed a finding of bad faith, and the present case is striking but not surprising. *In re Laguna Associates* also involved a Beztak property and a scheme to avoid foreclosure involving Mr. Toll, the lawyer for Trident Associates. While Trident Associates has attempted to distinguish the present case from *In re*

Laguna Associates, we find those distinctions to be meaningless. In the present case the following factors from *Laguna* weigh heavily in support of the bankruptcy court's finding:

First, Trident Associates exhibits the "new debtor syndrome": it is a one-asset debtor created on the eve of foreclosure to isolate the property and MetLife from the rest of the Beztak real estate operations.

The second *Laguna* factor is met because the pre-petition conduct of this debtor was improper. We find three separate acts to support this conclusion. First, at the hearing on MetLife's request for a receiver, counsel for Beztak of Tri Atria arguably misled the district court when he stated that he knew nothing of the possibility of bankruptcy. The parties on appeal hotly contest whether any deception took place. After reviewing the transcript of the hearing before the district court and the transcript of counsels' arguments to the bankruptcy court, we are satisfied that counsel for MetLife was correct when she characterized counsel for the debtor as being less than frank with the district judge. In fact, when the bankruptcy court directly asked the debtor's counsel whether there had been some deception, counsel replied, "There may have been, but I don't think it should be seen in the light that MetLife would have you see it."

A second act of improper pre-petition conduct by the debtor was the unauthorized restructuring of Beztak of Tri Atria so that all the general partners were removed from general liability and given limited liability. This

restructuring violated the letter agreement and constituted another default under the mortgage. This restructuring only served the purpose of using the bankruptcy court to protect the general partners from liability, and weakened MetLife's position of security regarding the outstanding amount of approximately $22 million.

A third act of improper conduct was the filing of the state suit seeking a TRO to stop the foreclosure. The suit was filed in the name of Beztak of Tri Atria, an entity that no longer existed, and Mr. Luptak's affidavit made assertions that he must have known were not true.

The fourth *Laguna* factor is also present here. The debtor was unsuccessful in attempting to avoid the foreclosure sale in state court. After that attempt was unsuccessful, the debtor filed a Chapter 11 bankruptcy petition.

The seventh *Laguna* factor is met because Trident Associates has no employees and has no ongoing business. The employees that manage the Tri Atria Office Center are employed by Beztak Realty. The general partner of Trident Associates, Trident General, is a shell corporation formed to allow the former general partners to avoid personal liability.

The eighth *Laguna* factor is present here because there seems to be no possibility of reorganizing the debtor. The plan that Trident Associates submitted merely calls for a delay in MetLife receiving its payments and does not suggest what possible means Trident Associates will have to make any payments. MetLife currently has the rights to all rent payments from the tenants in the Tri Atria Office Center.

This court in *In re Laguna Associates* stated that the finding of bad faith is a fact based determination that is reviewed for clear error. After reviewing the record, we are convinced that the facts of this case cannot be meaningfully distinguished from *Laguna*. Consequently, we hold that the bankruptcy court did not clearly err when it found Trident Associates had filed in bad faith. We further hold that the bankruptcy court did not abuse its discretion by lifting the automatic stay and dismissing the petition.

III.

For these reasons, the bankruptcy court's lifting of the automatic stay and dismissal of Trident Associates' petition are **AFFIRMED.**

No. 93-2469

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: TRIDENT ASSOCIATES LIMITED PARTNERSHIP, A MICHIGAN LIMITED PARTNERSHIP, Debtor --- TRIDENT ASSOCIATES LIMITED PARTNERSHIP, D/B/A BEZTAK OF TRI ATRIA LIMITED PARTNERSHIP, A MICHIGAN LIMITED PARTNERSHIP, Plaintiff-Appellant, v. METROPOLITAN LIFE INSURANCE CO., Defendant-Appellant.	ORDER (Filed May 25, 1995)

BEFORE: CONTIE, RYAN, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition have been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

METROPOLITAN LIFE INSURANCE COMPANY,
Plaintiff,

vs.

HONIGMAN MILLER SCHWARTZ & COHN,
Defendant.

Case No. 94-CV-72288-DT

HON. BARBARA K. HACKETT

_____/

ORDER AFFIRMING ORDER OF BANKRUPTCY COURT

Appellant Metropolitan Life Insurance Company (MetLife) appeals the bankruptcy court's decision that it lacked jurisdiction to hear appellant's motion to compel disgorgement of debtor's counsel's retainer. For the reasons stated below, the decision of the bankruptcy court shall be affirmed.

BACKGROUND

Appellee Honigman Miller Schwartz & Cohn (Honigman Miller) represented debtor Trident Associates Limited Partnership (Trident) in its Chapter 11 bankruptcy petition. The voluntary petition for reorganization was filed on June 22, 1993. Creditor-appellant MetLife holds a $23 million mortgage on debtor's sole asset which is a commercial office building. Appellant MetLife filed a motion to dismiss debtor's bankruptcy petition. On July 15, 1993, the bankruptcy court granted MetLife's motion and dismissed debtor's Chapter 11 bankruptcy petition

on the grounds that the petition was filed in bad faith and there was no chance that debtor's plan could be funded or confirmed. On November 19, 1993, this court affirmed the bankruptcy court's dismissal of debtor's voluntary petition for Chapter 11 reorganization.

At the same time that debtor filed its bankruptcy petition, debtor also filed an application to employ Honigman Miller as its attorneys. On June 23, 1993, Honigman Miller filed a statement pursuant to Federal Rule of Bankruptcy Procedure 2016(b) disclosing payment of a $90,000 retainer by the debtor. In its motion for disgorgement of retainer tendered by debtor, appellant argued that Honigman Miller had non-waivable conflicts of interest which would have precluded its representation of the debtor under 11 U.S.C. § 327 and subjected its retainer to disgorgement pursuant to 11 U.S.C. §§ 327(a), 328(c) and 330. In addition, appellant argued that the funds debtor paid to retain Honigman Miller were the secured collateral of MetLife. On May 12, 1994, the bankruptcy court held a hearing on appellant's motion for disgorgement. At the hearing, the bankruptcy court ruled that it lacked jurisdiction to hear appellant's motion because the petition had been dismissed on July 15, 1993. Appellant MetLife now appeals that order.

STANDARD OF REVIEW

This court reviews the bankruptcy court's decision not to retain jurisdiction over appellant's motion for disgorgement under the abuse of discretion standard. *In re Lawson*, 156 B.R. 43 (Bankr. 9th Cir. 1993); *In re Querner*, 7

F.3d 1199, 1202 (5th Cir. 1993); *In re Morris*, 950 F.2d 1531, 1534 (11th Cir. 1992).

DISCUSSION

The issue is whether the bankruptcy court abused its discretion in refusing to exercise jurisdiction over MetLife's motion to compel disgorgement which was filed after the underlying bankruptcy case had been dismissed. Appellant MetLife contends that the bankruptcy court erred in concluding that it lacked jurisdiction to hear appellant's motion for two reasons: (1) the district court granted a stay of the order pending appeal to the Sixth Circuit; and, (2) the bankruptcy court has inherent power to rule on appellant's motion.

The court first considers appellant's argument that the bankruptcy court should have retained jurisdiction over the motion for disgorgement because of the issuance of a stay order. The stay order in effect at the time that the motion for disgorgement was heard was entered by this district court. After this court affirmed the decision of the bankruptcy court to dismiss debtor's Chapter 11 bankruptcy petition and to lift the automatic stay, debtor filed a motion for stay pending appeal to the Sixth Circuit. This court granted debtor's motion for a stay order which prevented MetLife from enforcing foreclosure proceedings against debtor's sole asset.

Although appellant MetLife is correct that the issuance of a stay pending appeal preserves the status quo and prohibits the creditor from collecting its debt or seeking enforcement of its remedies, the issuance of a stay pending appeal does not return jurisdiction to the

bankruptcy court. Appellant MetLife has cited no relevant authority in support of its argument. In fact, the issuance of the stay order did not magically return jurisdiction to the bankruptcy court and it is not grounds for reversing the bankruptcy court's decision.

The court next considers MetLife's argument that the bankruptcy court had inherent jurisdiction to decide the motion for disgorgement. Appellee Honigman Miller responds that the bankruptcy court lacked jurisdiction because the dismissal order did not expressly provide that the bankruptcy court retained jurisdiction over pending or related matters. MetLife contends, however, that no express language retaining jurisdiction is necessary.

In fact, the courts have disagreed over whether dismissal orders must expressly provide that they retain limited jurisdiction to resolve pending or future and related matters.[1] Some courts have held that the dismissal order must expressly provide for limited jurisdiction over related claims else the bankruptcy court is barred from addressing those matters.[2] Other courts, however, have held that the inclusion of retaining language is not necessary to address pending matters.[3]

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[1] *See In re Lawson*, 156 B.R. at 46, for a list of cases requiring express language and a list of cases holding that no express language is necessary.

[2] *See e.g. In re Talandis*, 95 B.R. 108 (Bankr. S.D. Iowa 1989); *In re Petty*, 848 F.2d 654 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989); *In re Fairway Missionary Baptist Church*, 131 B.R. 407 (Bankr. W.D. Tenn. 1991).

[3] *See e.g. In re Morris*, 950 F.2d 1531 (11th Cir. 1992); *In re Eighty South Lake, Inc.*, 81 B.R. 580 (9th Cir. 1987); *In re Carraher*, 971 F.2d 327 (9th Cir. 1992).

The Court of Appeals for the Sixth Circuit has not addressed the issue. In deciding this appeal, the court need not decide the issue either. Although some courts have held that bankruptcy courts may exercise residual jurisdiction whether or not the dismissal order so provides, these courts have emphasized that the exercise of such residual jurisdiction is left to the sound discretion of the bankruptcy court.[4] In this case, there is no question that the bankruptcy court did not abuse its discretion in declining to exercise jurisdiction.

The bankruptcy court's decision not to exercise jurisdiction is entitled to deference and will only be overturned if the bankruptcy court committed a clear error of judgment. *See In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992). In determining whether the bankruptcy court abused its discretion, this court considers the factors of judicial economy, fairness, and convenience to the litigants. *In Re Querner*, 7 F.3d at 1202; *In re Stardust Inn, Inc.*, 70 B.R. 888, 891 (Bank. E.D. Pa. 1987). These factors are the same ones that a federal district court must consider in deciding whether to retain jurisdiction over pendent state claims after the dismissal of federal claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 353 (1988).

Applying these factors, the court determines that the bankruptcy court did not abuse its discretion by failing to

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[4] *See e.g. In re Querner*, 7 F.3d 1199 (5th Cir. 1993); *In re Lawson*, 156 B.R. 43 (Bankr. 9th Cir. 1993); *In re Morris*, 950 F.2d 1531, 1534 (Bankr. 11th Cir. 1992); *In re Smith*, 866 F.2d 576, 580 (Bankr. 3d Cir. 1989); *In Re Samford*, 102 B.R. 724 (Bankr. E.D. Mo. 1989).

exercise jurisdiction over MetLife's motion for disgorgement of Honigman Miller's retainer. The interests of judicial economy weigh against retaining jurisdiction over MetLife's motion for disgorgement. Although MetLife's motion involved bankruptcy issues, the matter could have been brought in a separate action and did not need to be addressed by the same court that dismissed the bankruptcy petition. MetLife brought the motion for disgorgement more than eight months after debtor's bankruptcy petition had been dismissed. In addition, the bankruptcy petition was dismissed just 22 days after it was filed. Because MetLife filed its motion for disgorgement more than eight months after the bankruptcy petition had been summarily dismissed, MetLife has failed to show that litigating the matter in bankruptcy court would have conserved judicial resources. MetLife has not shown that it would be prejudiced by litigating the matter in another forum. Although MetLife argues that it would be more convenient to the parties to litigate the matter in the bankruptcy court, this factor is not so compelling as to require the bankruptcy court to exercise jurisdiction.

Based on the record before the court, the bankruptcy court did not abuse its discretion by failing to retain jurisdiction over MetLife's motion for disgorgement after the bankruptcy case had been dismissed. Accordingly,

IT IS ORDERED that the bankruptcy court's order denying MetLife's motion to compel disgorgement of retainer hereby is AFFIRMED.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: October 18, 1994

In the Matter of TRIDENT ASSOCIATES LIMITED PARTNERSHIP, a Michigan Limited Partnership, d/b/a Beztak of Tri Atria Limited Partnership, Debtor.

TRIDENT ASSOCIATES LIMITED PARTNERSHIP, a Michigan Limited Partnership, d/b/a Beztak of Tri Atria Limited Partnership, Plaintiff-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY, Defendant-Appellee.

Bankruptcy No. 93-46907-G
No. 93-72996.

United States Bankruptcy Court,
E.D. Michigan,
Southern Division.

Sept. 30, 1993.

MEMORANDUM OPINION AND ORDER

RAY REYNOLDS GRAVES, Chief Judge.

This Court is presented with creditor Metropolitan Life Insurance Company's (Metropolitan) motion to lift and annul the automatic stay and for dismissal based upon the completion of a Pre-Bankruptcy Foreclosure by Advertisement and Debtor's Motion in Opposition to Metropolitan's motions.

INTRODUCTION

At first blush, it appears that this case turns upon the crucial issue of whether a foreclosure by advertisement occurred pre- or post-bankruptcy, where the debtor filed for protection some nine (9) minutes after the foreclosure sale began. However, Metropolitan pursued and ultimately prevailed upon its motion for dismissal based upon a lack of good faith on the part of the debtor, Trident Associates.

FACTS

On June 22, 1993, a foreclosure by advertisement was scheduled to open at 10:00 a.m. for the purpose of selling a building that the debtor was purchasing from the mortgagee MetLife. Almost simultaneous to the foreclosure sale, some nine minutes later, the debtor filed for protection pursuant to chapter 11 of the Bankruptcy Code. Although the pleadings are replete with accusations with respect to the timing issue as to whether the foreclosure sale was complete or not at the time of the sale, during

the hearing, the parties argued for dismissal solely based upon a lack of good faith on the part of debtor Trident.

MetLife artfully presented this court with a clear and concise chart which reflects the debtor's pre-bankruptcy strategy in preparation for bankruptcy.[1] The recitation by MetLife revealed a methodical plunge into bankruptcy.

On or about June 22, 1993, Trident Associates Limited Partnership (debtor) also operating as Beztak of Tri Atria Limited Partnership, filed a Voluntary Petition under chapter 11 of the Bankruptcy Code. The single asset of the

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[1] The facts that transpired pre-petition are crucial:

a. On June 14, 1993, the debtor prepared a Voluntary Chapter 11 Bankruptcy Petition, in the name of Trident Associates Limited Partnership. Julio Puzzuoli signed the Bankruptcy Petition on that date as representative of Trident General, Inc., the general partner of the debtor.

b. Trident General, Inc. was not incorporated until June 15, 1993. The incorporator was Kenneth Clarkson, an attorney with the Evans and Luptak law firm of which Mr. Luptak is a principal and with which Mr. Beznos is affiliated.

c. On June 15, 1993, a certificate of Amendment of Limited Partnership was filed, changing the name of the Beztak Limited Partnership to Trident Associates Limited Partnership without the express permission of MetLife as required.

d. During the hearing to appoint a receiver the debtor assured the Court that it would not file Bankruptcy in an effort to have the motion denied.

e. The debtor, in an effort to thwart foreclosure proceedings made several unsubstantiated and inaccurate declarations in a desperate attempt to deceive court officials to prevent the sale.

debtor is an office and commercial building in Farmington Hills, Michigan known as Tri Atria Center. Creditor Metropolitan is the holder of a note, mortgage and assignment of rents and leases executed by Tri Atria Company to secure a principal indebtedness of $23,000,000.00.

Eventually, Beztak failed to pay 1990 and 1992 real property taxes causing an event of default under the mortgage. On or about May 4, 1993, MetLife recorded a Notice of Default in the terms and conditions of mortgage with the Oakland County Register of Deeds and thereafter began foreclosing by advertisement proceedings. The foreclosure sale was originally scheduled for June 15, 1993 but was adjourned until June 22, 1993 at 10:00 a.m. in the Oakland County Courthouse. The foreclosure sale was held at 10:00 a.m. on June 22, and Metropolitan was the successful bidder at the sale having made a bid in the amount of $19,000,000.00 at approximately 10:05 a.m.

Minutes later at approximately 10:09 a.m. the debtor commenced the instant bankruptcy proceeding. It is interesting to note that Beztak is not the debtor in this matter but rather Trident Associates Limited Partnership, as Beztak was apparently reconstituted to create the new entity without notice to Metropolitan as required.[2] Therefore, Trident now has a corporate general partner, which was not formed until after the schedules filed with this Court were executed.

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[2] The debtor knew of this requirement to seek consent.

DISCUSSION

MetLife asserts that its motion for relief from the automatic stay should be granted pursuant to 11 U.S.C. § 362(d) for a myriad of reasons:

1) the debtor does not have equity in the security property;[3]

2) the property is not necessary for an effective reorganization;

3) the debtor has exhibited bad faith by reforming a new entity and transferring the assets of Beztak without further notifying MetLife and obtaining permission in compliance with the security agreement.

Although it is rare for this Court to lift the automatic stay as a result of bad faith, this case is representative of the archetype bad faith case. Generally, a determination of whether bad faith exists is to be determined based upon the totality of the circumstances. *Society National Bank v. Barrett*, 964 F.2d 588 (6th Cir.1992). In determining whether a chapter 11 debtor has acted in bad faith, the Sixth Circuit has looked at factors such as whether the debtor has any assets, whether the debtor has an ongoing business to reorganize and if there is a reasonable probability that a confirmable plan can be prepared. *In re Winshall Settlor's Trust*, 758 F.2d 1136 (6th Cir.1985). Moreover, courts have specifically considered factors which evidence an intent to abuse the judicial process, and in particular, factors which evidence that the debtor filed a

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[3] During the hearing, all parties agreed that the debtor did not have equity.

petition to delay or frustrate the legitimate efforts of secured creditors to enforce their contractual rights. *In re Phoenix Picadilly, Ltd.*, 849 F.2d 1393 (11th Cir.1988).

Correspondingly, the facts in the instant case ostensibly portray unambiguous manifestations of bad faith. Although standing alone a single asset real estate case is not cause for dismissal, it does give rise to further inquiry. Furthermore, the debtor admittedly does not have equity in the property and does not have any other ongoing business to reorganize.

The timing of the debtor's filing is pernicious and demonstrates an attempt to delay the foreclosure action commenced by MetLife thus frustrating MetLife's efforts to enforce its contractual rights. The foreclosure sale commenced on June 22, 1993 at 10:00 a.m. and the petition was filed at 10:09 a.m. Such timing was clearly meant to delay the effect of the foreclosure sale.

CONCLUSION

MetLife is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d). The debtor lacks equity in the asset and there is no realistic possibility of a successful reorganization. Moreover, the debtor has failed to adhere to requirements of the security agreement and has disregarded terms set forth in the agreement and proceeded in the face of the note and blatantly acting outside of the agreement in bad faith attempted to proceed in spite of MetLife. Accordingly, the plan is not feasible or facially confirmable.

For the reasons stated above, this case has demonstrated cause to lift the automatic stay.

IT IS SO ORDERED.

Case No: 93-2469

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Jun. 2, 1995)

In re: TRIDENT ASSOCIATES LIMITED PARTNERSHIP, a Michigan limited partnership

Debtor

TRIDENT ASSOCIATES LIMITED PARTNERSHIP, doing business as Beztak of Tri Atria Limited Partnership, a Michigan limited partnership

Plaintiff-Appellant

v.

METROPOLITAN LIFE INSURANCE CO.

Defendant-Appellee

BEFORE: CONTIE, RYAN, and SILER; Circuit Judges.

Upon consideration of the motion to stay the mandate filed by the appellant,

And upon further consideration of the response in opposition filed by the appellee,

It is **ORDERED** that the motion be, and hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/gt
Leonard Green, Clerk

(2)

No. 95-182

Supreme Court, U.S.
FILED
AUG 24 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

TRIDENT ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLARK, KLEIN & BEAUMONT, P.L.C.
J. WALKER HENRY
Counsel Of Record
WILLIAM B. DUNN
JUDI GREENSTONE MILLER
MICHAEL S. KHOURY
1600 First Federal Building
Detroit, Michigan 48226-1962
(313) 965-8300
Counsel for Respondent
Metropolitan Life Insurance Company

August 24, 1995

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in affirming the Bankruptcy Court Orders which dismissed the Chapter 11 petition under 11 U.S.C. § 1112(b) and lifted/annulled the automatic stay under 11 U.S.C. § 362(d)(1) because "cause" existed based upon its finding that the petition had been filed in bad faith?

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF RESPONDENT

Dormant Subsidiaries and Companies of which Respondent directly or indirectly has actual ownership (for its own account) of 10% through 99% of the total outstanding voting stock include the following:[1]

1038624 Ontario Inc.
161397 Canada Inc.
478077 Alberta Ltd.
810597 Ontario Inc.
810660 Ontario Inc.
Albany General Insurance Company Limited
Anthony's Holding Corporation
Blodgett Holdings, Inc.
Braelan Corp.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Centennial Equities Corporation
Chart House Enterprises, Inc.
Cicero/Cermak Corporation
Cloverleaf Properties, Inc.
Cross & Brown Company of Georgia, Inc.
Cross & Brown Company of Maryland, Inc.
Cross & Brown Company of Missouri, Inc.
Cross & Brown Company of Ohio, Inc.
Dan River, Inc.
Eclipse Claim Services Inc.
Federal Street Financial Advisers, Inc.
First Health Associates, Inc.

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[1] Current as of December 31, 1994. If requested, an update of the list will be made available.

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF RESPONDENT – Continued

Frialator International, Limited
Genesis Seguros De Retiro, S.A.
Genesis Seguros Generales, Sociedad Anonima De Seguros Y Reaseguros
GS Blodgett Corporation
GS Blodgett Inc.
GS Blodgett International Ltd.
Interbroker, Correduria De Reaseguros, S.A.
Interstate Bakeries Corporation
Interstate Brands Corporation
Kolon-Met Life Insurance Company
Lincoln Group Holding Corp.
Luther's Bar-B-Q', Inc.
Magikitch'n, Inc.
Management and Risk Institute, Inc.
Mecco Holding, Inc.
Met Life Agricultural Limited Partnership
Met Life International Real Estate Equity Shares, Inc.
MetLife Agricultural Credit Corp.
MetLife Funding II, Inc.
MetLife General Insurance Agency of Ohio, Inc.
MetLife Healthcare Network of Eastern Pennsylvania
MetLife Healthcare Network of Northeast Florida
MetLife Healthcare Network of South Florida
MetLife Healthcare Network of Western Florida
MetLife Independent Financial Services Limited
MetLife Limited Partnership I
MetLife Portfolios, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Financial Advisors Limited
Metropolitan Home Loans Limited
Metropolitan Life Insurance Services Limited
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Plan Managers Limited
Metropolitan Structures

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF RESPONDENT – Continued

Metropolitan Structures, Inc.
Metropolitan Structures West, Inc. d/b/a MS Management Services
Mezzanine Investment Limited Partnership-2
Mezzanine Investment Limited Partnership-6
Mezzanine Investment Limited Partnership-9
Mezzanine Investment Limited Partnership-10
Morguard Investments Limited
MS Management Services, Inc.
National Electronic Information Corporation
Park Avenue Funding Corporation
Pitco Frialator, Inc.
Ralph C. Sutro, Co.
RB & W Corporation
Santander Met, S.A.
Seguros Genesis, S.A. (Mexico)
Seguros Genesis, S.A. (Spain)
Southern Health Plan Management, Inc.
Southwest Capital Company
SSRM Services, Inc.
The Metrahealth Companies, Inc.

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No. 95-182

In The

Supreme Court of the United States

October Term, 1995

TRIDENT ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Metropolitan Life Insurance Company, respectfully prays that the Petition for Writ of Certiorari from the May 1, 1995 opinion and Judgment of the United States Court of Appeals for the Sixth Circuit be denied by this Court.

COUNTER-STATEMENT OF OPINIONS BELOW

The opinion and order cited and attached at 17a of Petitioner's Appendix to its Petition for Writ of Certiorari

is not the opinion and order referred to in the text, but rather another opinion and order issued subsequently by the United States District Court for the Eastern District of Michigan in other matters raised in the Bankruptcy Court, which are not the subject of the appeal to the United States Court of Appeals for the Sixth Circuit. The opinion and order of the United States District Court for the Eastern District of Michigan affirming the decision of the Bankruptcy Court, from which appeal to the United States Court of Appeals for the Sixth Circuit was taken and as to which Petitioner's Petition for Writ of Certiorari is sought, is not reported, and is appended hereto. (1a).

COUNTER-STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[2]

11 U.S.C. § 362 provides in relevant part as follows:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
> >
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if -

[2] Petitioner has included 11 U.S.C. § 1112(b) in its Brief, but has incorrectly referred to this statute as 11 U.S.C. § 1112(c).

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

* * *

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section –

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

COUNTER-STATEMENT OF THE CASE

Petitioner filed a voluntary petition under Chapter 11 of the Bankruptcy Code on June 22, 1993. Metropolitan Life Insurance Company, Respondent, filed two motions (the "Motions") to seek relief from the bankruptcy and to complete the foreclosure sale of real property, known as the Tri Atria Office Building, Petitioner's sole asset (the "Property"). Respondent sought to dismiss the bankruptcy petition under 11 U.S.C. § 1112(b) for "cause" based upon the petition having been filed in bad faith. Respondent also sought to lift and annul the automatic stay under 11 U.S.C. §§ 362(d)(1) and (2) contending that (i) "cause" existed to lift and annul the automatic stay under 11 U.S.C. § 362(d)(1) because the petition had been filed in bad faith, and (ii) Petitioner did not have any

equity in the Property, and the Property was not necessary to an effective reorganization under 11 U.S.C. § 362(d)(2).

The Bankruptcy Court held a hearing on the Motions on July 15, 1993. By that time, Petitioner had undertaken the following actions: (i) filed a disclosure statement and a plan of reorganization, (ii) stipulated that Respondent owned rents derived from the Property (the "Rents") based upon Respondent's prepetition exercise of its assignment of rents, (iii) stipulated that it did not have any equity in the Property, and (iv) stipulated to the authenticity and admissibility of all of the loan documents and other documents filed by Respondent in support of the Motions. Respondent also filed extensive objections to Petitioner's disclosure statement and plan of reorganization.

The Bankruptcy Court found that "cause" existed to dismiss the petition under 11 U.S.C. § 1112(b) and to lift/annul the automatic stay under 11 U.S.C. § 362(d)(1) because the petition had been filed in bad faith. In addition, the Bankruptcy Court also held that the automatic stay was to be lifted and annulled under 11 U.S.C. § 362(d)(2) because (i) Petitioner did not have any equity in the Property, a fact stipulated to by Petitioner; and (ii) there was no reasonable possibility of a successful reorganization within a reasonable time period based upon the Court's finding that Petitioner's plan was not feasible or facially confirmable. 176 B.R. 16, 19 (Bankr. E.D. Mich. 1993).

The decisions of the Bankruptcy Court were affirmed by the United States District Court for the Eastern District

of Michigan on November 19, 1993. (1a). The Court of Appeals for the Sixth Circuit affirmed the Bankruptcy Court's decisions on May 1, 1995. 52 F.3d 127 (6th Cir. 1995).

The Court of Appeals for the Sixth Circuit denied a petition for rehearing and a suggestion for rehearing *en banc* filed by Petitioner under Fed. R. App. Pro. 35 and 40. Subsequently, the Court of Appeals denied Petitioner's motion to stay issuance of the mandate. Once the mandate was issued by the United States Court of Appeals for the Sixth Circuit on June 2, 1995, Respondent recorded the Sheriff's Deed.

SUMMARY OF ARGUMENT

Petitioner has demonstrated no reason to grant a writ of certiorari. It has not shown that the decision of the United States Court of Appeals for the Sixth Circuit conflicts with the decision of any other circuit or that the case involves an important question of federal law which has not been, but should be, settled by this Court. Nor has it shown that the courts below departed from accepted judicial practice.

Petitioner argues that the decision below conflicts with the decisions of this Court in *Toibb v. Radloff*, 501 U.S. 157 (1991) and *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) by implying "good faith" as a requirement for a Chapter 11 debtor to file a petition under 11 U.S.C. § 109. The Sixth Circuit properly addressed the case on the basis of 11 U.S.C. §§ 362(d) and 1112(b), which authorize courts to lift and annul the automatic stay and to dismiss a

bankruptcy case for "cause." The Sixth Circuit considered all of the facts and held, on the basis of the totality of facts and circumstances, that requisite cause existed to justify the relief granted by the Bankruptcy Court. Petitioner has not contended and cannot demonstrate that the Sixth Circuit erred in this ruling. Bad faith was amply demonstrated through a pattern of egregious facts and pernicious conduct by Petitioner. Petitioner has given this Court no reason to grant its Petition for Writ of Certiorari.

The *Taylor* and *Toibb* decisions do not apply to the facts of this case because "cause" is an express statutory element contained in the Bankruptcy Code sections interpreted below. In both *Taylor* and *Toibb*, this Court was interpreting very specific statutory language, and rejected attempts to engraft extra requirements into the language when a plain reading of the statutes did not create such requirements. Neither of the statutory provisions addressed by this Court in *Taylor* or *Toibb* contained the term "cause," which is undefined, and therefore, requires a court to analyze and interpret information and reach a conclusion based on the totality of facts and circumstances.

Secondly, independent grounds under 11 U.S.C. § 362(d)(2) exist to justify the relief granted by the Bankruptcy Court. Petitioner stipulated that there was no equity in the Property, and consequently, the burden shifted to Petitioner pursuant to 11 U.S.C. § 362(g) to demonstrate that the Property was necessary for an effective reorganization. Petitioner failed to sustain this burden, and the court concluded that Petitioner's plan was not feasible or facially confirmable. The Sixth Circuit's ruling is consistent with this Court's ruling in *United*

Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988). Furthermore, Petitioner failed to preserve this issue for appeal. Because separate independent grounds exist to justify the relief granted under Section 362(d)(2), which will not change the ultimate result of this case, there is no reason for this Court to consider granting the Petition for Writ of Certiorari.

Lastly, Petitioner failed to secure a stay of proceedings pending appeal. Once the Sixth Circuit issued the mandate, Respondent recorded the Sheriff's Deed. Consequently, Petitioner is left only with a limited right to redeem the Property during the redemption period, which will terminate on December 2, 1995. There is no applicable legal theory or precedent indicating that the Court has power to rescind the foreclosure sale. The redemption period may not be retroactively stayed, extended or abridged by the courts without contravening state law. Therefore, the Court cannot grant effective relief in this matter.

REASONS FOR DENYING THE WRIT

I.

The Opinion Below Is Consistent With The Decisions Of The United States Courts Of Appeal And This Court And Does Not Raise Important Questions Calling For The Exercise Of This Court's Supervisory Powers.

Petitioner contends that the opinion below conflicts with the decisions of this Court in *Toibb v. Radloff, supra* and *Taylor v. Freeland & Kronz, supra* by implying "good

faith" as a requirement for a Chapter 11 debtor to file a petition under 11 U.S.C. § 109. Petitioner is incorrect because (i) the relief granted by the Bankruptcy Court was not premised on 11 U.S.C. § 109, but rather on the basis of 11 U.S.C. §§ 362(d) and 1112(b); (ii) the opinion is consistent with the decisions of all the federal courts of appeal which have ruled on this issue; and (iii) the decisions of this Court relied upon by Petitioner do not apply or support the result sought by Petitioner.

Section 362(d) allows a bankruptcy court to lift and/or annul the automatic stay for "cause." Section 1112(b) allows a bankruptcy court to dismiss a Chapter 11 petition for "cause." Neither of these sections define "cause," and therefore, its meaning is left to the interpretation of the courts. *In re Universal Life Church, Inc.*, 127 B.R. 453, 455 (E.D. Cal. 1991), *aff'd*, 965 F.2d 777 (9th Cir. 1992); *Manhattan King David Restaurant Inc. v. Levine*, 163 B.R. 36, 40 (S.D.N.Y. 1993). It is clear, however, that "cause" is not limited to the list of factors specifically enumerated in each of the Bankruptcy Code provisions. *In re Gonic Realty Trust*, 909 F.2d 624, 626 (1st Cir. 1990); *In re Schriock Construction, Inc.*, 167 B.R. 569, 574-5 (Bankr. D.N.D. 1994); *In re Reichert*, 138 B.R. 522, 523 n.1 (Bankr. W.D. Mich. 1992).

All of the federal courts of appeal which have addressed the restated question presented have uniformly concluded that a debtor's bad faith may constitute "cause" under both of these provisions based upon an analysis and review of the totality of facts and circumstances.

1st Circuit:	*In re Coastal Cable T.V., Inc.*, 709 F.2d 762 (1st Cir. 1983).
2d Circuit:	*In re Sonnax Industries, Inc.*, 907 F.2d 1280 (2d Cir. 1990).
4th Circuit:	*Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).
5th Circuit:	*In re Little Creek Development Co.*, 779 F.2d 1068 (5th Cir. 1986); *In re Humble Place Joint Venture*, 936 F.2d 814 (5th Cir. 1991).
6th Circuit:	*In re Laguna Associates Limited Partnership*, 30 F.3d 734 (6th Cir. 1994); *In re Charfoos*, 979 F.2d 390 (6th Cir. 1992); *In re Barrett*, 964 F.2d 588 (6th Cir. 1992); *In re Zick*, 931 F.2d 1124 (6th Cir. 1991).
7th Circuit:	*In re Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984).
8th Circuit:	*In re Wieseler*, 934 F.2d 965 (8th Cir. 1991); *Basin Electric Power Cooperative v. Midwest Processing Co.*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).
9th Circuit:	*In re Arnold*, 806 F.2d 937 (9th Cir. 1986).
11th Circuit:	*In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988); *In re Natural Land Corp.*, 825 F.2d 296 (11th Cir. 1985).

This Court has also recognized that the Bankruptcy Code gives courts substantial discretion to dismiss a

Chapter 11 case under 11 U.S.C. § 1112(b) for "cause." *Toibb v. Radloff*, 501 U.S. at 165. The plain language of these Code provisions envisioned that the courts would be given discretion to determine those facts and circumstances which would provide the requisite cause to grant relief under 11 U.S.C. §§ 362(d) and 1112(b).

Nevertheless, Petitioner contends that *Taylor* and *Toibb* have overturned these circuit court decisions which have held that a debtor's bad faith constitutes cause to dismiss the petition and/or to lift and annul the automatic stay. Petitioner is wrong. In both *Taylor* and *Toibb*, this Court was dealing with very specific statutory language. *Toibb* addressed the statutory requirements regarding eligibility to file a Chapter 11 proceeding under 11 U.S.C. § 109(d), while *Taylor* dealt with the obligations of a debtor to list property in the bankruptcy schedule as exempt pursuant to 11 U.S.C. § 522(l). In both of these cases this Court rejected attempts to engraft extra requirements into the language when a plain reading of the statutes did not create such requirements. In contrast to the statutory provisions involved in the restated question presented, however, neither of those statutory provisions contained terms such as "cause" which must be subject to judicial scrutiny and interpretation. As the United States Court of Appeals concluded below:

> It is a very different argument to say that "bad faith" cannot, as a matter of law, constitute "cause" than to say that § 109 does not require good faith. Neither the holding of *Taylor* nor *Toibb* is broad enough to achieve the result for which Trident Associates argues.

52 F.3d at 131. Petitioner has mischaracterized the underlying issues in the stated question and failed to recognize the applicable Code provisions. Instead, Petitioner prefers to ignore the actual facts of the case and switch to a hypothetical case involving an order requiring good faith under 11 U.S.C. § 109, which, as correctly found by the Sixth Circuit, is something entirely different.

Petitioner suggests that the circuit courts have established a so-called good faith litmus test to deprive real estate debtors bankruptcy relief. The rulings of all the circuit courts of appeal are not before this Court: only the ruling in this case is in question! This argument is also specious because the only issue before this Court is whether the opinions below are justified under a plain reading of the statute. First, the decisions below equating "bad faith" with "cause" have not been limited solely to real estate debtors. *See, e.g., In re Charfoos, supra; In re Zick, supra.* The courts of appeal uniformly hold that bad faith may constitute "cause," based upon a review of the totality of facts and circumstances and pursuant to a plain reading of the statute, to justify the relief granted by these courts. From a review of the facts of each of these appellate decisions, bad faith was amply demonstrated through a pattern of egregious facts and conduct by debtors, evidencing the requisite "cause" to justify the relief granted by the courts. Similar egregious facts were found by the court below.

Lastly, as part of the recent bankruptcy amendments, Congress has not altered either Section 362(d) or Section 1112(b) of the Code as relates to "cause." In fact, contrary to Petitioner's contention, Congress has imposed additional limitations to the rules governing real estate

debtors under the Bankruptcy Reform Act of 1994, Public Law 103-314, Section 218 (single asset real estate), by requiring the commencement of monthly payments to secured creditors "in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate." 11 U.S.C. § 362(d)(3)(B).

II.

Independent Grounds Under 11 U.S.C. § 362(d)(2) Exist To Justify The Relief Granted By The Bankruptcy Court Which Are Not Subject To The Petition For Writ Of Certiorari.

In addition to finding "cause" to lift and annul the automatic stay under 11 U.S.C. § 362(d)(1), the Bankruptcy Court also lifted and annulled the automatic stay pursuant to 11 U.S.C. § 362(d)(2) because Petitioner had no equity in the Property and the Property was not necessary to an effective reorganization. Prior to the hearing, Petitioner had stipulated that there was no equity in the Property. Consequently, the burden of proof shifted to Petitioner under 11 U.S.C. § 362(g) to demonstrate that the Property was necessary for an effective reorganization. Petitioner failed to sustain this burden.

The Bankruptcy Court concluded that Petitioner's plan was not feasible or facially confirmable. 176 B.R. at 19. Having failed to preserve this issue for appellate review, Petitioner has waived this issue, and therefore, it is not subject to consideration by this Court. Supreme Court Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court"). *See also Taylor v. Freeland & Kronz*, 503 U.S. at

646 (quoting from *Youakim v. Miller*, 425 U.S. 231 (1976) (*per curium*) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]")). Furthermore, there are no "unusual circumstances" that warrant the Court addressing this issue at this time. *Berkemer v. McCarty*, 468 U.S. 420, 433 n.38 (1984).

The Bankruptcy Court's ruling under 11 U.S.C. § 362(d)(2) is consistent with this Court's rulings and the plain meaning of the statute. *See, e.g., United Savings Association of Texas v. Timbers of Inwood Forest*, 484 U.S. at 376 n.2 (1988). Petitioner did not and could not demonstrate that there was a reasonable possibility of a successful reorganization within a reasonable time period, particularly when Petitioner stipulated that Respondent, by virtue of its exercise of the Assignment of Rents, owned all the income derived from the Property.

Separate independent grounds exist under 11 U.S.C. § 362(d)(2) to justify the relief granted by the Bankruptcy Court. Because the ultimate result of this case will not be altered by consideration of the issues raised by Petitioner in the Petition for Writ of Certiorari, there is no reason for this Court to grant the Writ.

III.

The Issues For Which Petitioner Seeks Review By This Court Are Moot.

The United States Court of Appeals for the Sixth Circuit denied Petitioner's Motion for Stay of the Mandate and issued the mandate on June 2, 1995. Respondent promptly recorded the Sheriff's Deed on that day, thereby commencing the running of the six month redemption

period under Michigan law. Petitioner contends, despite completion of the foreclosure sale and recordation of the deed, that this case is still ripe for determination by this Court. Petitioner has cited various cases to justify retention of jurisdiction; however, they do not apply to the facts of this case. None of these cases dealt with issues relating to sales of real property, foreclosure or redemption.

Petitioner failed to secure a stay of proceedings during the pendency of this appeal or prior to the recordation of the Sheriff's Deed for the purpose of maintaining the status quo, and therefore, Petitioner is left only with its right to redeem the Property during the redemption period. State law determines Petitioner's limited interest in the Property irrespective of Petitioner's bankruptcy filing. *Butner v. United States*, 440 U.S. 48 (1979). Under Michigan law, Petitioner's right of redemption will terminate during the pendency of this appeal, on December 2, 1995, and thereby vest title to the Property in Respondent. MICH. COMP. LAWS ANN. § 600.3240 (West 1995).

Petitioner may argue that the mere existence of a right of redemption cures any condition of mootness. Although Petitioner has a limited right to re-acquire the Property through redemption under state law, it is well settled that once the redemption period expires and no stay pending appeal is in existence, the appeal is moot. *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1173 (9th Cir. 1988); *In re Matos*, 790 F.2d 864, 865 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1296 (11th Cir. 1984).

The right to redeem within the respective foreclosure statutes can neither be retroactively stayed, extended nor abridged by the courts without contravening state law. *Gordon Grossman Building Co. v. Elliott*, 171 N.W.2d 441, 444 (Mich. 1969); *Detroit Trust Co. v. George*, 247 N.W. 697, 697 (Mich. 1933); *In re Lashley*, 825 F.2d 362, 364 (11th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988); *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325, 1327 (11th Cir. 1985). As the court stated in *Gordon Grossman Building Co.*:

> We accept as a general rule that the right to redeem under present statutes is a legal right and can neither be enlarged nor abridged by the courts. See *Detroit Trust Co. v. George* (1933), 262 Mich 362; *Drysdale v. P.J. Christy Land Co.* (1929) 245 Mich 184.

171 N.W. 2d at 444. Consequently, the Court cannot grant effective relief to Petitioner even if it prevails on the merits of the appeal, and therefore, the issue presented by Petitioner is moot.

Nevertheless, Petitioner contends that the transaction can be unraveled in order to divest Respondent of title to the Property. This argument begs the question. There is no precedent requiring property to be reconveyed under these circumstances. *See Markstein, supra* at 1327 ("When the bankruptcy court sets aside an automatic stay pursuant to Section 362(d), and the debtor fails to obtain a stay pending appeal with the result that the property is sold to a creditor at foreclosure, a court is powerless to rescind the sale on appeal"); *In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731, 736 (5th Cir. 1990) ("[T]o grant adequate relief the court would be required to reverse the foreclosure transaction, which the court is unable to do").

The foreclosure sale has been concluded in compliance with applicable state law procedures, and the Sheriff's Deed has been properly recorded by Respondent.[3] Petitioner simply did not act in a timely fashion to preclude Respondent from recording the deed. Therefore, the Court should not exercise its powers of limited discretionary review in a matter where any relief granted will be futile and moot unless Petitioner redeems from foreclosure.

CONCLUSION

The decisions rendered below are consistent with the eight federal circuit courts of appeal which have addressed the issue of bad faith of a debtor as providing "cause" to dismiss the bankruptcy petition and to lift and annul the automatic stay. The trier of fact found the facts and circumstances of this case to demonstrate egregious and pernicious conduct on the part of Petitioner, which amply justified the relief granted by the court. The applicable Code provisions are clear and unambiguous on their face providing "cause" as a basis for the relief granted by the courts. Separate and independent grounds exist to justify the relief granted by the Bankruptcy Court. The Code provisions have been properly construed and

[3] In a subsequent case between the same parties known as *Trident Associates Limited Partnership v. Metropolitan Life Insurance Company*, Case No. 95-CV-72270-DT, the United States District Court for the Eastern District of Michigan issued an unpublished opinion holding the foreclosure sale was completed. A copy of the opinion is contained in the Appendix at 7a.

there is no reason to grant the Petition for Writ of Certiorari. Respondent, Metropolitan Life Insurance Company, respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

CLARK, KLEIN & BEAUMONT, P.L.C.
J. WALKER HENRY
Counsel of Record
WILLIAM B. DUNN
JUDITH GREENSTONE MILLER
MICHAEL S. KHOURY
1600 First Federal Building
Detroit, Michigan 48226
(313) 965-8300
Counsel for Respondent Metropolitan Life Insurance Company

Dated: August 24, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:
Trident Associates Limited Partnership, a Michigan Limited Partnership,

Debtor,

_____ /

Trident Associates Limited Partnership, a Michigan Limited Partnership, d/b/a Beztak of Tri Atria Limited Partnership,

Appellant,

vs.

Metropolitan Life Insurance Company,

Appellee.

_____ /

Case No. 93-CV-72996-DT

HON. BARBARA K. HACKETT

ORDER AFFIRMING DECISIONS OF BANKRUPTCY COURT

Debtor-appellant appeals the bankruptcy court's orders dismissing his bankruptcy petition and lifting the automatic stay. The bankruptcy court dismissed the petition and lifted the stay based upon its factual determination that the petition had been filed in bad faith. For the reasons set forth below, the bankruptcy court's decisions shall be affirmed.

FACTUAL BACKGROUND

Debtor-appellant's primary asset is approximately 13 acres of real property on which an office building known as Tri Atria is located. The property is subject to a $23 million mortgage held by Metropolitan Life Insurance Company (Metlife). Debtor defaulted on the note by failing to pay the 1990 winter real estate taxes and the 1992 real property taxes. On May 4, 1993, Metlife recorded a notice of default with the Oakland County Register of Deeds. On May 10, 1993, the security property was sold at a tax sale to Metlife. As a result of the entry of default, Metlife was entitled to receive the rents from the security property. On June 15, 1993, Metlife served notice to tenants of the Tri Atria office complex to pay rents to Metlife. After the entry of default, Metlife also began foreclosure by advertisement proceedings on May 14, 1993.

After foreclosure proceedings had begun and on the eve of filing the bankruptcy petition, the debtor partnership was restructured without the consent of Metlife as required by the loan documents. Debtor filed its bankruptcy petition on June 22, 1993, the same day that the foreclosure sale occurred. Metlife filed motions to lift the automatic stay and dismiss the bankruptcy petition on the grounds that it had been filed in bad faith. On July 9, 1993, a hearing on the motions was held and the bankruptcy court made a factual finding that the petition had been filed in bad faith and granted the motions lifting the stay and dismissing the case.

STANDARD OF REVIEW

The decision to lift the automatic stay is within the discretion of the bankruptcy court. 11 U.S.C. § 362 (d). This court must apply an abuse of discretion standard in reviewing the bankruptcy court's decision to lift the stay. *Stephens Indus. Inc. v. McClung*, 789 F.2d 386, 391 (6th Cir. 1986). This court applies a "clearly erroneous" standard in reviewing the bankruptcy court's factual finding that the petition was filed in bad faith. *In Re Charfoos*, 979 F.2d 390, 392 (6th Cir. 1992).

BAD FAITH STANDARD

The Sixth Circuit has stated that bad faith must be "evaluated under flexible and multiple standards." *In Re Charfoos*, 979 F.2d at 393. The Sixth Circuit has cautioned that dismissal for lack of good faith:

> should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

In Re Zick, 931 F.2d 1124, 1129 (6th Cir. 1991). Relevant factors to consider when determining whether a Chapter 11 petition to reorganize has been filed in good faith are "whether the debtor has any assets, whether the debtor had an ongoing business to reorganize, and whether there was a reasonable probability of a plan being proposed and confirmed." *Matter of Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985). Ultimately, the decision to dismiss a bankruptcy petition for bad faith must

be determined by the "totality of the circumstances." *In Re Caldwell,* 851 F.2d 852, 860 (6th Cir. 1988).

DISCUSSION

In this case, the bankruptcy court determined that the petition was filed in bad faith for the following reasons:

(1) there was no likelihood that debtor's plan could be funded or confirmed and no indication that it would work;

(2) debtor reorganized its corporate form on the eve of filing the bankruptcy petition without the consent of Metlife as required by the loan agreement; and,

(3) debtor "engaged in a pattern of shadow boxing"[1] with Metlife by representing that it was not pursuing filing a Chapter 11 petition when in fact it was.

Based upon a careful review of the record and the arguments set forth in the parties' briefs, the court determines that the bankruptcy court's finding of debtor-appellant's bad faith in filing its Chapter 11 petition was not clearly erroneous.

Debtor argues that the bankruptcy court erred by deciding the issue of bad faith based solely upon arguments of counsel. The record shows that the bankruptcy court did not rely solely upon counsels' arguments but

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[1] Transcript at p.51.

relied on substantial documentary evidence.[2] Debtor also argues that the record does not support a finding of bad faith. This court disagrees. The facts in this case supporting a finding of bad faith are almost identical to the facts cited in *In Re Laguna Assoc. Ltd. Partnership*, 147 B.R. 709 (Bankr. E.D. Mich. 1992). In addition, the bankruptcy court followed Sixth Circuit precedent when it found bad faith existed based upon the totality of the circumstances including the fact that there was no reasonable probability of debtor's plan being confirmed. *Matter of Winshall Settlor's Trust, supra; In Re Caldwell, supra.*

Finally, debtor argues that the bankruptcy court's orders were premature because debtor was moving rapidly towards confirmation and should have been allowed time to amend its reorganization plan under the Supreme Court's holding in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988). That case, however, did not involve a bankruptcy petition filed in bad faith. Furthermore, the bankruptcy court found that debtor could not fund its reorganization plan and that on its face the plan was not capable of confirmation. Because the bankruptcy court's finding of bad faith was not clearly erroneous,

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[2] In addition to documentary evidence, debtor admitted on the record that debtor had restructured its legal form on the eve of bankruptcy without the required consent of Metlife. Transcript at pp. 33-34.

IT IS ORDERED that the bankruptcy court's dismissal of appellant's petition and lifting of the automatic stay hereby are AFFIRMED.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: November 19, 1993.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TRIDENT ASSOCIATES
LIMITED PARTNERSHIP, d/b/a
Tri Atria Office Building,

Plaintiff,

vs.

Case No.
95-CV-72270-DT

METROPOLITAN LIFE
INSURANCE COMPANY, a
New York corporation,

HON. BARBARA
K. HACKETT

Defendant.

_____ /

ORDER DENYING PLAINTIFF'S MOTION TO REMAND AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, TO SET ASIDE NOTICE OF LIS PENDENS, AND FOR ATTORNEY FEES

This is the fourth lawsuit that plaintiff Trident Associates Limited Partnership (Trident) or one of its corporate predecessors has filed in an attempt to prevent defendant from completing the foreclosure of the Tri Atria office complex. Defendant Metropolitan Life Insurance (MetLife) removed this lawsuit from state court. Plaintiff filed a motion to remand. MetLife opposes the motion to remand and has filed a motion for summary judgment, to set aside Notice of Lis Pendens, and for costs, expenses and attorney fees incurred in defending against this alleged frivolous and vexatious litigation. For the reasons stated below, plaintiff's motion to remand

shall be denied and defendant's motion shall be granted in its entirety.

BACKGROUND

Plaintiff filed this declaratory judgment action seeking a ruling that the foreclosure sale of the Tri Atria office complex was void because of the filing of plaintiff's bankruptcy petition. Plaintiff's complaint also sought an injunction enjoining MetLife from recording the sheriff's deed. MetLife recorded its sheriff's deed on June 2, 1995, rendering plaintiff's request for injunctive relief moot.

This lawsuit arises out of MetLife's attempts to foreclose its mortgage in the Tri Atria office complex and the 13 acres on which it is located in Farmington, Michigan. On October 13, 1987, MetLife loaned $23 million to Trident's predecessor, Tri Atria Company (Tri Atria). Tri Atria later reorganized as a new entity, Beztak of Tri Atria Limited Partnership. Beztak of Tri Atria defaulted on the mortgage by failing to pay 1990 and 1992 property taxes. Thus, under the terms of the mortgage, MetLife accelerated the debt effective May 1, 1993. On May 10, 1993, the Oakland County Treasurer conducted a forced sale of its tax lien interest for the 1990 winter taxes. MetLife purchased this lien for $314,066.

On May 14, 1993, MetLife advertised notice of its proposed foreclosure sale of the property. The foreclosure sale was scheduled for June 15, 1993. On May 21, 1993, MetLife filed suit against Beztak of Tri Atria seeking appointment of receiver, declaratory and injunctive relief, and recovery of converted funds. That lawsuit was

assigned to this judge. The foreclosure sale was postponed until June 22, 1993, so that the court could hold a hearing on the motion for appointment of receiver and preliminary injunction. This court denied MetLife's motion for appointment of receiver and preliminary injunction and instructed the parties to continue negotiations to resolve the matter.

On June 15, 1993, Beztak of Tri Atria underwent a total restructuring and changed its name to Trident in violation of the letter agreement, which constituted a default under the mortgage. Despite its restructuring, one day before the foreclosure sale was to occur, Beztak of Tri Atria filed an action in Oakland County Circuit Court seeking to enjoin the foreclosure sale. The court denied the motion to enjoin the sale. At 10:09 a.m. on June 22, 1993, the day scheduled for the foreclosure proceedings, Trident filed a Chapter 11 bankruptcy petition. As a result of the filing of the bankruptcy petition, an automatic stay became effective. 11 U.S.C. § 362. The foreclosure sale took place between 10 and 11 a.m. on June 22, 1993, and MetLife was the highest bidder. MetLife bid $19,500,000 for the Tri Atria office complex. On July 15, 1993, the bankruptcy court dismissed the bankruptcy petition for bad faith filing and annulled the automatic stay.

On July 16, 1993, Trident appealed the bankruptcy court's dismissal of its petition. On July 22, 1993, the bankruptcy court entered a consent order modifying an order granting Trident a stay pending appeal, thus the deed was never recorded in MetLife's name. Under the terms of the consent order, PM Realty Group, Ltd. was appointed manager of the property for the benefit of MetLife and Trident. This court affirmed the ruling of the

bankruptcy court. *Trident Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co.*, Slip Op., No. 93-CV-72996 (E.D. Mich. Nov. 19, 1993). On November 22, 1993, just three days after this court affirmed the bankruptcy court's dismissal order, Trident filed its third lawsuit against MetLife in Oakland County Circuit Court seeking a declaratory judgment that the foreclosure sale was a nullity. Trident later voluntarily dismissed that lawsuit on December 15, 1993.

Trident also appealed the bankruptcy court's decision to the Sixth Circuit. While on appeal to the Sixth Circuit, a stay pending appeal remained in effect. The Sixth Circuit also affirmed the dismissal of the bankruptcy petition. *Trident Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co.*, 52 F.3d 127 (6th Cir. 1995). As such, MetLife was free to record its deed to the Tri Atria office building and the 13 acres on which it is located and did so on June 2, 1995. In order to prevent the completion of the foreclosure sale, however, Trident filed this declaratory judgment action. The complaint is nothing more than a transparent attempt to relitigate previously adjudicated issues.

DISCUSSION

A. Plaintiff's motion to remand

Plaintiff Trident has filed a motion to remand the lawsuit. Plaintiff incorrectly argues that diversity jurisdiction does not exist on the basis that the amount in controversy does not exceed the jurisdictional amount. Plaintiff seeks only injunctive relief, not monetary damages. The law is well-settled, however, that the amount in

controversy required for diversity jurisdiction is measured by the value of the subject of the litigation. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936). The subject of this litigation is the validity of the foreclosure sale of the Tri Atria office complex. It is undisputed that MetLife's bid at the foreclosure sale was $19,500,000. Thus, it is clear that the controversy exceeds the jurisdictional amount.

Trident also argues that this case was improperly removed because it is an allegedly "ancillary proceeding" to the lawsuit MetLife filed against Trident's partners in Oakland County Circuit Court. The parties have agreed to refer to that litigation as the "Guaranty Case." Trident argues that "proceedings ancillary to an action pending in state court cannot be removed." Charles A. Wright & Arthur A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 3721 at 202.

The prohibition against the removal of ancillary proceedings is inapplicable here because the Guaranty Case is not ancillary to the instant action. MetLife commenced the Guaranty Case against the guarantors of the Tri Atria loan. Additional claims for wrongful distributions were later asserted against individuals who were either general partners of Trident's predecessor organization or recipients of the distributions. The validity of the foreclosure sale is not an issue in the Guaranty Case. Trident is not a party in that case, and no claim is asserted in that case by or against Trident or its general partner. In sum, the Guaranty Case does not share the required commonality of claims or parties which are necessary to find that it is

an "ancillary proceeding." Thus, remand based upon the existence of the Guaranty Case would be inappropriate.

Finally, plaintiff argues that even if the lawsuit is not remanded, it should be stayed pursuant to the *Colorado River* doctrine because an allegedly "parallel" state proceeding is pending in state court. The *Colorado River* doctrine was set forth by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). That case allowed federal courts to abstain from deciding a federal court action in deference to a pending state proceeding in certain extraordinary circumstances. It is a doctrine of judicial economy designed to prevent duplicative litigation. Having already determined that the Guaranty Case is *not* an ancillary proceeding to this lawsuit, there is no role for the application of the *Colorado River* doctrine. Furthermore, this lawsuit is duplicative of two bankruptcy appeals decided and denied by the federal courts. It would not further the interests of judicial economy to burden yet another forum by remanding this litigation. Because this court has jurisdiction and has once again considered the matter and found it to be without merit, plaintiff's motion to remand is denied.

B. Defendant's motion for summary judgment

Plaintiff argues that the foreclosure sale should be set aside on the grounds that it filed a bankruptcy petition and an automatic stay entered before the foreclosure sale was complete. Plaintiff is correct that if the foreclosure sale was completed in violation of the automatic stay, it would be void and without effect. *Kalb v. Feuerstein*, 308

U.S. 433, 443 (1940). However, the bankruptcy court dismissed the bankruptcy petition for bad faith filing and annulled the automatic stay. An order annulling the automatic stay acts retroactively to allow a foreclosure sale taken subsequent to the filing of the bankruptcy petition to be ratified. *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984). Once an order annulling the automatic stay has been entered, the stay becomes a nullity; the parties are restored to their pre-stay status, and the stay is treated as though it never entered. *Id.* Because the bankruptcy court annulled the automatic stay, the foreclosure sale is allowed to stand and MetLife is permitted to record the deed to complete the foreclosure sale. *In the Matter of Washtenaw Huron Inv. Corp.*, 150 B.R. 31, 36 (E.D. Mich. 1993).

Plaintiff is asking this court to ignore the fact that the bankruptcy court dismissed plaintiff's bankruptcy petition as having been filed in bad faith and annulled the automatic stay. That order has been affirmed by this court and by the Court of Appeals for the Sixth Circuit. This lawsuit is an improper attempt to collaterally attack plaintiff's failed appeal of its dismissed bankruptcy petition. The foreclosure sale, which took place before the bankruptcy petition was filed, is allowed to stand.

Trident also claims that the foreclosure sale was never completed because it notified the sheriff's office of the filing of its bankruptcy petition prior to the sale. In support of this argument, Trident has submitted the affidavit of the deputy sheriff. The deputy sheriff's affidavit does not reference the Tri Atria foreclosure sale at all, but merely identifies the office's general foreclosure procedures. Under those general procedures, if the sheriff is

notified before 11 a.m. that a mortgagor of a property scheduled for sale has filed a bankruptcy petition, he pulls the sheriff's deed without completing the bidding process. The sheriff does not remember if he actually followed that procedure in this case. Furthermore, Trident has submitted no proof that the sheriff pulled the deed in the case of the Tri Atria sale.

MetLife, on the other hand, has submitted proof that the Tri Atria foreclosure sale was in fact completed. MetLife has submitted the affidavit of foreclosure sale witness Nancy Howarth. Howarth's affidavit states that before a foreclosure sale is halted, a verification of the bankruptcy filing must be received. Howarth further testified that she did not receive any such verification prior to the completion of the Tri Atria sale. She further states that if the foreclosure sale was not completed, she would have returned the sheriff's fee. In the case of the Tri Atria foreclosure sale, the sheriff's fee was not returned. MetLife has submitted a copy of the cancelled check and the receipt. MetLife also submitted a photocopy of the sheriff's log book of completed foreclosure sales. It shows that the Tri Atria foreclosure sale was recorded as having been completed. Based upon this evidence, it is clear that the foreclosure sale of the Tri Atria office complex was completed. Trident's unsupported allegations are insufficient to overcome the convincing evidence submitted by MetLife. Therefore, defendant is entitled to summary judgment as a matter of law. Accordingly,

IT IS ORDERED that plaintiff's motion to remand hereby is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment hereby is GRANTED.

IT IS FURTHER ORDERED that the Notice of Lis Pendens hereby is set aside.

IT IS FURTHER ORDERED that defendant is entitled to costs and attorney fees incurred in defending against this vexatious litigation pursuant to 28 U.S.C. § 1927. In the event that the parties are unable to reach a settlement as to costs and attorney fees owing, defendant is ordered to submit on or before August 21, 1995, affidavit(s) and/or other proof of its costs and attorneys fees incurred in defending against this litigation. Plaintiff shall respond in a brief of not more than 20 pages within 10 days after service of the motion. Defendant may file a reply brief in conformity with the Local Rules of this district.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: July 24, 1995.
Detroit, Michigan.